

Apr 29, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

JOSEPH M.,<sup>1</sup>

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 1:18-cv-03091-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 16, 17

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 16, 17. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 16, and grants Defendant's Motion, ECF No. 17.

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them only by their first names and the initial of their last names.

## JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

## STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless  
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

### 7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within  
9 the meaning of the Social Security Act. First, the claimant must be “unable to  
10 engage in any substantial gainful activity by reason of any medically determinable  
11 physical or mental impairment which can be expected to result in death or which  
12 has lasted or can be expected to last for a continuous period of not less than twelve  
13 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be  
14 “of such severity that he is not only unable to do his previous work[,] but cannot,  
15 considering his age, education, and work experience, engage in any other kind of  
16 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
17 423(d)(2)(A).

18 The Commissioner has established a five-step sequential analysis to  
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
20 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s

1 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in  
2 “substantial gainful activity,” the Commissioner must find that the claimant is not  
3 disabled. 20 C.F.R. § 404.1520(b).

4 If the claimant is not engaged in substantial gainful activity, the analysis  
5 proceeds to step two. At this step, the Commissioner considers the severity of the  
6 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers  
7 from “any impairment or combination of impairments which significantly limits  
8 [his or her] physical or mental ability to do basic work activities,” the analysis  
9 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment  
10 does not satisfy this severity threshold, however, the Commissioner must find that  
11 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

12 At step three, the Commissioner compares the claimant’s impairment to  
13 severe impairments recognized by the Commissioner to be so severe as to preclude  
14 a person from engaging in substantial gainful activity. 20 C.F.R. §  
15 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the  
16 enumerated impairments, the Commissioner must find the claimant disabled and  
17 award benefits. 20 C.F.R. § 404.1520(d).

18 If the severity of the claimant’s impairment does not meet or exceed the  
19 severity of the enumerated impairments, the Commissioner must pause to assess  
20 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),

1 defined generally as the claimant's ability to perform physical and mental work  
2 activities on a sustained basis despite his or her limitations, 20 C.F.R. §  
3 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's  
5 RFC, the claimant is capable of performing work that he or she has performed in  
6 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is  
7 capable of performing past relevant work, the Commissioner must find that the  
8 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of  
9 performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing other work in the national economy.  
12 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner  
13 must also consider vocational factors such as the claimant's age, education and  
14 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of  
15 adjusting to other work, the Commissioner must find that the claimant is not  
16 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to  
17 other work, the analysis concludes with a finding that the claimant is disabled and  
18 is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

19 The claimant bears the burden of proof at steps one through four above.  
20 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to

1 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
2 capable of performing other work; and (2) such work “exists in significant  
3 numbers in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*,  
4 700 F.3d 386, 389 (9th Cir. 2012).

### 5 **ALJ’S FINDINGS**

6 On November 5, 2014, Plaintiff applied for Title II disability insurance  
7 benefits, alleging a disability onset date of January 12, 2014. Tr. 167-73. The  
8 application was denied initially, Tr. 102-08, and on reconsideration, Tr. 110-15.  
9 Plaintiff appeared at a hearing before an administrative law judge (ALJ) on March  
10 29, 2017. Tr. 42-68. On May 19, 2017, the ALJ denied Plaintiff’s claim. Tr. 12-  
11 38.

12 At step one, the ALJ found that Plaintiff had not engaged in substantial  
13 gainful activity during the period from his alleged onset date of January 12, 2014,  
14 through his date last insured of September 30, 2015. Tr. 17. At step two, the ALJ  
15 found Plaintiff had the following severe impairments: spinal impairment, obesity,  
16 and affective disorder. Tr. 17. At step three, the ALJ found Plaintiff did not have  
17 an impairment or combination of impairments that meets or medically equals the  
18 severity of a listed impairment. Tr. 17. The ALJ then concluded that Plaintiff had  
19 the RFC to perform sedentary work with the following limitations:

20 [Plaintiff] had the residual functional capacity to lift and carry ten pounds  
frequently and twenty pounds occasionally. He could stand and/or walk for

1 two hours in an eight-hour workday. He could sit for six hours in the same  
2 period. He could occasionally stoop, kneel, crouch, crawl, and climb ramps  
3 and stairs. He could not climb ladders, rope, and scaffolding. He needed to  
4 avoid concentrated exposure to hazards. He could understand, remember,  
5 and carry out simple instructions. He could make judgments commensurate  
6 with the functions of unskilled work (i.e., work which needs little or no  
7 judgment to do simple duties that can be learned in thirty days or less). He  
8 could respond appropriately to supervision and coworkers. He could tolerate  
9 occasional changes in the work environment.

6 Tr. 21, 31.

7 At step four, the ALJ found Plaintiff was unable to perform any past relevant  
8 work. Tr. 30. At step five, the ALJ found that, considering Plaintiff's age,  
9 education, work experience, RFC, and testimony from a vocational expert, there  
10 were other jobs that existed in significant numbers in the national economy that  
11 Plaintiff could perform, such as document preparer, final assembler, and escort  
12 vehicle driver. Tr. 30-31. The ALJ concluded Plaintiff was not under a disability,  
13 as defined in the Social Security Act, from January 12, 2014, the alleged onset  
14 date, through September 30, 2015, the date last insured. Tr. 31.

15 On April 23, 2018, the Appeals Council denied review, Tr. 1-6, making the  
16 ALJ's decision the Commissioner's final decision for purposes of judicial review.  
17 *See* 42 U.S.C. § 1383(c)(3).

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1. Whether the ALJ properly weighed Plaintiff's symptom claims;
2. Whether the ALJ properly weighed the medical opinion evidence; and
3. Whether the ALJ properly determined that Plaintiff could perform other work in the national economy at step five.

## DISCUSSION

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting his subjective symptom claims. ECF No. 16 at 7-10.

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1 claimant] has alleged; [the claimant] need only show that it could reasonably have  
2 caused some degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th  
3 Cir. 2009).

4 Second, “[i]f the claimant meets the first test and there is no evidence of  
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
8 omitted). General findings are insufficient; rather, the ALJ must identify what  
9 symptom claims are being discounted and what evidence undermines these claims.  
10 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*  
11 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently  
12 explain why it discounted claimant’s symptom claims). “The clear and convincing  
13 [evidence] standard is the most demanding required in Social Security cases.”  
14 *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r*  
15 *of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting  
17 effects of an individual’s symptoms include: 1) daily activities; 2) the location,  
18 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
19 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; 5) treatment, other than medication, an individual receives or has  
2 received for relief of pain or other symptoms; 6) any measures other than treatment  
3 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
4 factors concerning an individual's functional limitations and restrictions due to  
5 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §  
6 404.1529 (2011). The ALJ is instructed to "consider all of the evidence in an  
7 individual's record," "to determine how symptoms limit ability to perform work-  
8 related activities." SSR 16-3p, 2016 WL 1119029, at \*2.

9 The ALJ found that Plaintiff's medically determinable impairments could  
10 reasonably be expected to cause the alleged symptoms, but that Plaintiff's  
11 statements concerning the intensity, persistence, and limiting effects of his  
12 symptoms were not entirely consistent with the evidence. Tr. 22.

13 *1. Ability to Work with Impairments*

14 The ALJ found Plaintiff's allegations were inconsistent with his past ability  
15 to work with his impairments. Tr. 22. Working with an impairment supports a  
16 conclusion that the impairment is not disabling. *See Drouin v. Sullivan*, 966 F.2d  
17 1255, 1258 (9th Cir. 1992); *see also Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d  
18 1219, 1227 (9th Cir. 2009) (seeking work despite impairment supports inference  
19 that impairment is not disabling). The ALJ noted that Plaintiff reported his spinal  
20 impairment resulted from an injury that occurred in approximately September

1 2013. Tr. 22; *see* Tr. 271 (Plaintiff reported that he was lifting heavy boxes in a  
2 back room at Walmart on September 28, 2013 and afterwards he began getting  
3 progressive low back pain, severe burning, aching pain, and numbness along the  
4 left lower extremity); Tr. 326 (Plaintiff reported that he was involved in a work  
5 accident at Walmart on September 26, 2013). The ALJ indicated that Plaintiff  
6 reported a history of depression since his time in the military in 2011 and 2012,  
7 and treatment records from April 2012 refer to Plaintiff having previously been on  
8 antidepressants. Tr. 22 (citing Tr. 270, 470). The ALJ noted that Plaintiff reported  
9 he experienced back pain that prohibited him from working by limiting his ability  
10 to sit, stand, or bend, and required him to rest in bed most of the time. Tr. 22, 49-  
11 51. However, the ALJ observed that Plaintiff was able to work following his back  
12 injury and despite his depression. Tr. 22; *see* Tr. 197-98 (Plaintiff's work history  
13 report indicated that Plaintiff's position at Walmart between August 2013 and  
14 January 2014 required him to stand and/or walk eight hours per day and frequently  
15 lift 30 to 40 pounds); Tr. 48 (Plaintiff testified that he worked for Walmart in  
16 Texas until early 2014). The ALJ reasonably concluded that Plaintiff's ability to  
17 work with both his spinal impairment from a 2013 injury and his depression from  
18 2011 or 2012, indicated that Plaintiff's impairments were not as severe as he  
19 alleged. Tr. 22.

1           2. *Stopped Work for Reasons Unrelated to Impairments*

2           The ALJ found Plaintiff's symptom complaints were less reliable because he  
3 stopped working for reasons other than his impairments. Tr. 22. An ALJ may  
4 consider that a claimant stopped working for reasons unrelated to the allegedly  
5 disabling condition in making a credibility determination. *See Bruton v.*  
6 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). The ALJ noted that Plaintiff  
7 testified he experienced back pain that prohibited him from working by limiting his  
8 ability to sit, stand, or bend, and required him to rest in bed most of the time. Tr.  
9 49-51. However, the ALJ also noted that Plaintiff testified he stopped working in  
10 January 2014 because he mistakenly believed that he had been terminated from his  
11 job as an unloader at Walmart. Tr. 22, 48-49. He testified that his Walmart work  
12 schedule in January 2014 conflicted with a required meeting with a flight chief,  
13 and he had accordingly been told not to come into work at Walmart because of this  
14 scheduling conflict. Tr. 48. Plaintiff testified he had mistakenly believed this to be  
15 his notice of termination, and by the time this misunderstanding about his  
16 termination was revealed, he had already arranged to move to Washington. Tr. 48.  
17 The ALJ reasonably concluded that this reason for stopping work undermines  
18 Plaintiff's claim that his back pain and depression suddenly made it impossible for  
19 him to work at all. Tr. 22. The ALJ permissibly relied upon this reason to  
20 discredit Plaintiff's symptom claims. Furthermore, Plaintiff fails to challenge this

1 finding, so argument on this issue is waived. *See Carmickle v. Comm’r Soc. Sec.*  
2 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (determining Court may decline  
3 to address on the merits issues not argued with specificity); *Kim v. Kang*, 154 F.3d  
4 996, 1000 (9th Cir. 1998) (the Court may not consider on appeal issues not  
5 “specifically and distinctly argued” in the party’s opening brief). This finding is  
6 supported by substantial evidence.

### 7 3. Lack of Supporting Medical Evidence

8 The ALJ found Plaintiff’s symptom allegations were not consistent with the  
9 medical evidence. Tr. 22-26. An ALJ may not discredit a claimant’s symptom  
10 testimony and deny benefits solely because the degree of the symptoms alleged is  
11 not supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853,  
12 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991);  
13 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400 F.3d  
14 676, 680 (9th Cir. 2005). However, the medical evidence is a relevant factor in  
15 determining the severity of a claimant’s symptoms and their disabling effects.  
16 *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2). Minimal objective evidence  
17 is a factor which may be relied upon in discrediting a claimant’s testimony,  
18 although it may not be the only factor. *See Burch*, 400 F.3d at 680.

19 First, the ALJ found the medical evidence was not consistent with Plaintiff’s  
20 allegations of severe physical limitations. Tr. 22; *see* Tr. 49-51. The ALJ

1 acknowledged that Plaintiff's examinations and test results showed nerve root  
2 impairment in his lumbar spine. Tr. 22; *see* Tr. 272, 307 (January 2014: MRI of  
3 Plaintiff's lumbar spine showed a herniated disc that compromised the left S1  
4 nerve root). However, the ALJ determined that Plaintiff's treatment records  
5 approximate to his disability onset date were inconsistent with the severity of his  
6 alleged physical limitations. Tr. 22; *see, e.g.*, Tr. 538 (Plaintiff did not receive  
7 treatment for his back injury until two or three months after its alleged onset in  
8 September 2013); Tr. 445-47 (January 11, 2014 (day before disability onset date):  
9 Plaintiff visited an urgent care facility and reported mild pain in his lower back,  
10 denied any weakness in his lower extremities, exhibited normal gait and station  
11 with point tenderness in his lower back, and was given Flexeril for his lower back  
12 pain); Tr. 285-89 (January 11, 2014 (day before disability onset date): Plaintiff  
13 visited an emergency room and gave the same complaints as at the urgent care  
14 facility earlier that day, examination of Plaintiff's back was normal except for left  
15 lumbar tenderness, and he was given Morphine and Lorazepam); Tr. 297-99  
16 (January 12, 2014 (alleged onset date): Plaintiff returned to the emergency room  
17 and reported his symptoms had initially improved but then had worsened, denied  
18 having abnormal sensations (paresthesia), inspection of his back was normal with  
19 no tenderness and normal gait, and he was again given Morphine and Lorazepam);  
20 Tr. 308 (January 16, 2014: when initiating a workers' compensation claim a few

1 days after his urgent care and emergency room visits, Plaintiff needed assistance  
2 throughout his examination due to alleged symptoms that prevented him from  
3 walking without assistance<sup>2</sup>); Tr. 271-73 (February 3, 2014: Plaintiff's back pain  
4 had improved from a 10 at its onset to a five on a 10-point scale with conservative  
5 treatment measures, he affirmed his back pain had progressively improved with  
6 these measures with decreased but continued symptoms in his left leg, he displayed  
7 full strength in his right leg and his left knee with 4/5 strength in his left ankle, he  
8 exhibited decreased sensation in the left L5-S1 distribution, and due to his ongoing  
9 improvement Plaintiff declined decompression/microdiscectomy surgery and  
10 instead chose to proceed with conservative treatment, was referred to physical  
11 therapy and prescribed ibuprofen and Flexeril); Tr. 274-75 (February 24, 2014:  
12 Plaintiff described "mild back pain" at a three on a 10-point scale, his left leg  
13 symptoms had improved, he reported his symptoms had "improved tremendously"  
14 with his conservative treatment regimen, he demonstrated full strength in all

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16 <sup>2</sup> This treatment note appears to show an incorrect date. Tr. 308. The treatment  
17 note is dated January 16, 2013, which was prior to Plaintiff's injury in September  
18 2013. Tr. 308. The ALJ states that this treatment note was dated "four days" after  
19 Plaintiff's emergency room visit, and neither party objects to this characterization  
20 of the date. Tr. 23. The Court reads this note as dated "January 16, 2014."

1 muscle groups of all four extremities with intact sensation, and his neurosurgeon  
2 consultant predicted his symptoms would continue to improve with conservative  
3 treatment).

4       Based on this record, the ALJ reasonably concluded that Plaintiff's  
5 subjective symptom testimony was not supported by the medical evidence. Tr. 22-  
6 25. Plaintiff challenges the ALJ's conclusion by offering evidence that Plaintiff  
7 argues supports his symptom claims. ECF No. 16 at 8-10; *see, e.g.*, Tr. 272, 307  
8 (January 2014: MRI of Plaintiff's lumbar spine showed Plaintiff had a herniated  
9 disc that compromised the left S1 nerve root); Tr. 326 (July 21, 2014: examination  
10 by ARNP Dennis Ang showed positive left-sided straight leg raise on the left  
11 starting at 15 degrees with severe weakness over his left plantar flexion and  
12 dorsiflexion at 3/5 with severely diminished rapid toe raises as well on the left,  
13 noticeable atrophy of the left calf more than the right, right side was completely  
14 unremarkable at 5/5). Where evidence is subject to more than one rational  
15 interpretation, the ALJ's conclusion will be upheld. *Burch*, 400 F.3d at 679. The  
16 Court will only disturb the ALJ's findings if they are not supported by substantial  
17 evidence. *Hill*, 698 F.3d at 1158. Here, the ALJ's conclusion remains supported  
18 by substantial evidence despite the additional evidence identified by Plaintiff.

19 Because the ALJ's finding is based on a rational interpretation of the evidence, the  
20 Court defers to the ALJ's interpretation. Furthermore, even if the ALJ did err in



1 this analysis, the ALJ accounted for Plaintiff's subjective pain symptoms in the  
2 RFC by limiting him to sedentary work with additional functional limitations. Tr.  
3 21. Accordingly, Plaintiff is not entitled to relief on these grounds.

4       4. *Improvement After Surgery and Medication Effective in Controlling*  
5       *Symptoms*

6       The ALJ found Plaintiff's symptom testimony was inconsistent with the  
7 significant level of improvement he showed following his spinal surgery, and with  
8 documented pain relief from daily use of pain medication. Tr. 23. The  
9 effectiveness of treatment is a relevant factor in determining the severity of a  
10 claimant's symptoms. 20 C.F.R. § 404.1529(c)(3); *see Warre v. Comm'r of Soc.*  
11 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled  
12 with medication are not disabling for purposes of determining eligibility for  
13 benefits) (internal citations omitted); *see also Tommasetti v. Astrue*, 533 F.3d 1035,  
14 1040 (9th Cir. 2008) (a favorable response to treatment can undermine a claimant's  
15 complaints of debilitating pain or other severe limitations).

16       Here, the ALJ observed that while Plaintiff's surgery on July 21, 2014 did  
17 not resolve his spinal impairment, his treatment records and examination findings  
18 were consistent with the ability to tolerate sedentary work activity through the date  
19 last insured of September 30, 2015. Tr. 23. The ALJ also noted that Plaintiff's  
20 allegations of debilitating pain symptoms were inconsistent with his treatment

1 records through his date last insured, which documented adequate pain relief with  
2 daily use of pain medication. Tr. 23; *see, e.g.*, Tr. 343-44 (July 21, 2014: Plaintiff  
3 proceeded with spinal surgery); Tr. 349-50 (August 5, 2014: Plaintiff reported  
4 “significant improvement” in his symptoms, with reduced back pain and increased  
5 activity level, exhibited full strength in his lower extremities, intact sensation in all  
6 lower extremity dermatomes, steady and non-antalgic gait, negative straight leg  
7 raises, was given instructions to begin weaning off of a back brace in two to three  
8 weeks, and was referred to additional physical therapy); Tr. 347-48 (September  
9 2014: Plaintiff was given tapered dosages of Valium and Percocet); Tr. 345-46  
10 (December 2014: Plaintiff reported some degree of continued symptoms in his left  
11 leg which were “not as apparent at this point,” made no documented references to  
12 severe pain symptoms, reported he had not used Valium or Percocet in several  
13 days, exhibited full strength, straight leg raise revealed some tightness in his lower  
14 back but otherwise no neurological deficit, and pain medication was again tapered  
15 with the expectation that he would be completely off pain medication within two  
16 months).

17       The ALJ also discussed Plaintiff’s documented adequate pain relief, despite  
18 a January 2015 MRI of Plaintiff’s lumbar spine which found bulging disks that  
19 appeared to cause some nerve root compression at L5-S1, and an August 2015 CT  
20 scan of Plaintiff’s lumbar spine which was similar to the January 2015 imaging.

Tr.24, 372-73, Tr. 464-67; *see, e.g.*, Tr. 377-78 (January 2015: during an orthopedic appointment, the provider noted that Plaintiff had been “doing extremely well,” his leg pain had improved, although he exhibited antalgic gait in his left leg, concurrent with reports of pain symptoms in his left leg); Tr. 379-80 (February 2015: Plaintiff reported some improvement in his pain symptoms, which were a five on a 10-point scale, displayed slight weakness in his left ankle, and had stopped his pain medication); Tr. 387-88 (May 2015: Plaintiff had a normal examination of his lower extremities, moved without difficulty, did not rise to stand during conversation, was taking no medication, and was told to use ice and heat for his spinal impairment); Tr. 389-91 (May 2015: Plaintiff reported pain as a three on a 10-point scale, reported infrequent use of Percocet, “slightly positive” left straight leg raise, and examination found no significant neurological deficit); Tr. 479-84 (July and August 2015: Plaintiff reported that his pain symptoms were manageable with daily use of pain medication, he could tandem walk without difficulty on the right and with a little difficulty on the left, and he exhibited “excellent” bilateral strength throughout both of his legs); Tr. 494-501 (July 2015 through September 2015: Plaintiff could rise from a chair without difficulty, appeared comfortable when seated, and exhibited normal gait). The ALJ reasonably concluded that the improvement Plaintiff reported in his symptoms after his July 2014 surgery, along with pain medication, supported a finding that

1 Plaintiff was capable of sedentary work with additional functional limitations,  
2 which was inconsistent with Plaintiff's subjective symptom claims. Furthermore,  
3 Plaintiff fails to challenge the ALJ's conclusion, so argument on this issue is  
4 waived. *See Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. This was a  
5 clear and convincing reason to discredit Plaintiff's symptom testimony.

6 *5. Inconsistent Statements and Exaggeration*

7 The ALJ found Plaintiff's physical symptom claims were undermined by  
8 evidence of Plaintiff exaggerating his symptoms, and his mental claims were  
9 undermined by Plaintiff's inconsistent reports regarding his depression. Tr. 22-25.  
10 The ALJ may appropriately consider a claimant's tendency to exaggerate. *See*  
11 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (the ALJ appropriately  
12 considered Plaintiff's tendency to exaggerate when assessing Plaintiff's credibility,  
13 which was shown in a doctor's observation that Plaintiff was uncooperative during  
14 cognitive testing but was "much better" when giving reasons for being unable to  
15 work.). In evaluating a claimant's symptom claims, an ALJ may consider the  
16 consistency of an individual's own statements made in connection with the  
17 disability review process with any other existing statements or conduct made under  
18 other circumstances. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (The  
19 ALJ may consider "ordinary techniques of credibility evaluation," such as  
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1 reputation for lying, prior inconsistent statements concerning symptoms, and other  
2 testimony that “appears less than candid.”).

3 First, the ALJ found Plaintiff’s physical symptom claims were undermined  
4 by evidence of Plaintiff exaggerating his symptoms. Tr. 22-25. Plaintiff argues  
5 that the ALJ failed to explain what statements Plaintiff made that suggested  
6 exaggeration or how this undermines Plaintiff’s complaints. ECF No. 16 at 8.  
7 Despite Plaintiff’s contentions, the ALJ referenced two instances of physical  
8 symptom exaggeration in the record. Tr. 22-25. The ALJ compared Plaintiff’s  
9 treatment notes from three visits to an urgent care facility and the emergency room  
10 the day before and the day of Plaintiff’s alleged disability onset date, with  
11 examination notes from just four days later when Plaintiff was initiating a workers’  
12 compensation claim. Tr. 22-23, *see* Tr. 285-89, 297-99, 308, 445-47. At the  
13 urgent care and emergency room visits on January 11 and 12, 2014, Plaintiff  
14 reported mild pain in his lower back, denied any weakness in his lower extremities,  
15 denied having abnormal sensations (paresthesia), exhibited normal gait and station  
16 with point tenderness, examination of his back was normal except for left lumbar  
17 tenderness, and then he had a wholly normal inspection of his back with no  
18 tenderness. Tr. 285-89, 297-99, 445-47. The examination notes from four days  
19 later revealed significantly different results, as Plaintiff required assistance  
20

1 throughout his examination due to alleged symptoms that prevented him from  
2 walking without assistance. Tr. 308.

3 The ALJ also cited to evidence after Plaintiff's date last insured that  
4 indicated exaggeration of his spinal impairment in pursuit of state assistance. Tr.  
5 24. During an independent medical evaluation in February 2016, examining  
6 physician Dr. Seltzer noted Plaintiff was able to sit without any apparent  
7 discomfort, but his gait was "grossly abnormal and non-physiologic." Tr. 545.  
8 According to Dr. Seltzer, Plaintiff "almost stomps as he is walking and catches  
9 himself holding on to [sic] furniture. He demonstrated nothing like that as he was  
10 walking into the exam room." Tr. 545. Plaintiff had other non-physiologic  
11 examination findings at this time, such as pain with block rotation or light shoulder  
12 pressure, he had markedly self-limiting examination of his lumbar spine with  
13 global complaints of pain with any movement. Tr. 546. Plaintiff also had  
14 inconsistent straight leg raise testing, which was completely negative in the seated  
15 position, and when supine his reports of pain with straight leg raise testing were  
16 deemed to be internally contradictory. Tr. 546. The ALJ noted that, contrary to  
17 Plaintiff's display of slight weakness in treatment settings, he now exhibited "give  
18 way collapsing" weakness in his left ankle, in a manner deemed non-physiologic  
19 by Dr. Seltzer. Tr. 546. Dr. Seltzer also deemed a display of decreased sensation  
20 in Plaintiff's left leg to be non-physiologic and non-dermatomal. Tr. 546. Dr.

1 Seltzer reported “[t]his is deemed to be in all probability willful misrepresentation  
2 as this examiner knows of no neurological, orthopedic condition that would permit  
3 [this finding].” Tr. 547. On this record, the ALJ reasonably concluded that  
4 Plaintiff exaggerated his symptoms. This finding is supported by substantial  
5 evidence and was a clear and convincing reason to discount Plaintiff’s symptom  
6 complaints.

7       Second, the ALJ found Plaintiff’s allegations of inability to work due to his  
8 mental impairment were undermined by Plaintiff’s inconsistent reports regarding  
9 his depression. Tr. 25. The ALJ’s decision to discount Plaintiff’s symptom claims  
10 because of inconsistencies in statements about depression is not supported by  
11 substantial evidence. Plaintiff reported that he is unable to work due to depression  
12 and lack of desire to be around other people. Tr. 54, 56-57, 209. The record cited  
13 by the ALJ, Tr. 288, 347-48, 387-88, 395-401, does not contain inconsistent  
14 statements by Plaintiff about his depression. Read in chronological order, the  
15 statements cited by the ALJ indicate that Plaintiff’s depression may have been  
16 escalating, but do not reveal inconsistencies with other statements made by  
17 Plaintiff. Tr. 25-26, *see, e.g.*, Tr. 288 (January 2014: Plaintiff displayed  
18 appropriate affect during examination); Tr. 347-48 (September 2014: Plaintiff  
19 reported having “some degree of depression” during medical care, with no signs of  
20 suicidal ideation at that time or in the past); Tr. 387-88 (May 2015: Plaintiff

1 reported withdrawing from activities and relationships due to anxiety and  
2 depression and he was again referred to a psychiatric evaluation); Tr. 395-401  
3 (April 2017: Plaintiff reported having depression that included frequent suicidal  
4 ideation and alleged he had lost his ability to concentrate). The ALJ noted that  
5 despite these allegations and his regular ongoing medical care, Plaintiff had no  
6 documented or reported mental health care. Tr. 25-26. As discussed *infra*, while  
7 the ALJ may consider an unexplained, or inadequately explained, failure to seek  
8 treatment when evaluating a claimant's subjective symptoms, this does not support  
9 a finding that Plaintiff made inconsistent statements about his depression. *See Orn*  
10 *v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). The ALJ's finding is not supported  
11 by substantial evidence. However, such an error is harmless where the ALJ lists  
12 additional reasons, supported by substantial evidence, for discrediting Plaintiff's  
13 symptom complaints. *See Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at  
14 1115 ("[S]everal of our cases have held that an ALJ's error was harmless where  
15 the ALJ provided one or more invalid reasons for disbelieving a claimant's  
16 testimony, but also provided valid reasons that were supported by the record.");  
17 *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)  
18 (holding that any error the ALJ committed in asserting one impermissible reason  
19 for claimant's lack of credibility did not negate the validity of the ALJ's ultimate  
20 conclusion that the claimant's testimony was not credible). Here, as discussed



1 *supra*, the ALJ identified several other reasons, supported by substantial evidence,  
2 to find Plaintiff's symptom testimony not credible. The Court "may not reverse an  
3 ALJ's decision on account of an error that is harmless." *Molina*, 674 F.3d at 1111.  
4 Plaintiff is not entitled to relief on these grounds.

5 *6. Lack of Mental Health Treatment*

6 The ALJ found that Plaintiff's lack of treatment for his longstanding  
7 depression further indicates that his mental impairment does not cause any  
8 significant limitations in his functioning. Tr. 26. An unexplained, or inadequately  
9 explained, failure to seek treatment or follow a prescribed course of treatment may  
10 be considered when evaluating the claimant's subjective symptoms. *Orn*, 495 F.3d  
11 at 638. Evidence of a claimant's self-limitation and lack of motivation to seek  
12 treatment are appropriate considerations in determining the credibility of a  
13 claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-  
14 66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 Fed. App'x 45, \*2 (9th Cir. 2009)  
15 (unpublished opinion) (considering why plaintiff was not seeking treatment).  
16 When there is no evidence suggesting that the failure to seek or participate in  
17 treatment is attributable to a mental impairment rather than a personal preference,  
18 it is reasonable for the ALJ to conclude that the level or frequency of treatment is  
19 inconsistent with the alleged severity of complaints. *Molina*, 674 F.3d at 1113-14.  
20 But when the evidence suggests lack of mental health treatment is partly due to a

1 claimant's mental health condition, it may be inappropriate to consider a  
2 claimant's lack of mental health treatment when evaluating the claimant's failure  
3 to participate in treatment. *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996).

4       The ALJ determined that Plaintiff's lack of treatment for depression  
5 detracted from the reliability of his statements about his mental state, particularly  
6 given his history of working despite his longstanding depressive disorder. Tr. 26.  
7 Plaintiff reported that he is unable to work due to depression and lack of desire to  
8 be around other people. Tr. 54, 56-57, 209. However, the ALJ noted that Plaintiff  
9 had no documented mental health care during the relevant period or after the date  
10 last insured. Tr. 26. During an independent psychiatric examination in September  
11 2015, Plaintiff affirmed he had no mental health care since the spring of 2014. Tr.  
12 470, 475. Plaintiff also reported a history of using antidepressants in 2011 and  
13 2012, which he then refused to take because of his belief that "they were just  
14 masking the problem rather than curing it." Tr. 470. In September 2015, Plaintiff  
15 explained that "my attitude before was that it was pathetic to take pills to be happy,  
16 but since I'm not progressing now I guess I'd be willing to try them again." Tr.  
17 471. The ALJ noted that Plaintiff's persistent use of benzodiazepines and opiates  
18 for pain symptoms indicated that he was not opposed to using psychotropic  
19 medication to mitigate impairments. Tr. 26. Further, there is no evidence to  
20 suggest that Plaintiff's failure to seek treatment is attributable to his mental

1 impairment rather than a personal preference. The ALJ reasonably relied on this  
2 evidence in evaluating Plaintiff's symptom claims. Furthermore, Plaintiff fails to  
3 challenge the ALJ's conclusion, so argument on this issue is waived. *See*  
4 *Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. This was a clear and  
5 convincing reason to discredit Plaintiff's symptom testimony.

### 6 **B. Medical Opinion Evidence**

7 Plaintiff challenges the ALJ's evaluation of the medical opinions of Jory  
8 Anderson, DC, Eric Rudd, M.D., Paul Furan, PA-C, Dennis Ang, ARNP, Norman  
9 Staley, M.D., S. Daniel Seltzer, M.D., John Robinson, Ph.D., Renee Eisenhauer,  
10 Ph.D, and Richard Schneider, M.D. ECF No. 16 at 10-13.

11 There are three types of physicians: "(1) those who treat the claimant  
12 (treating physicians); (2) those who examine but do not treat the claimant  
13 (examining physicians); and (3) those who neither examine nor treat the claimant  
14 [but who review the claimant's file] (nonexamining [or reviewing] physicians)."  
15 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
16 Generally, a treating physician's opinion carries more weight than an examining  
17 physician's, and an examining physician's opinion carries more weight than a  
18 reviewing physician's. *Id.* at 1202. "In addition, the regulations give more weight  
19 to opinions that are explained than to those that are not, and to the opinions of  
20

1 specialists concerning matters relating to their specialty over that of  
2 nonspecialists.” *Id.* (citations omitted).

3       If a treating or examining physician’s opinion is uncontradicted, the ALJ  
4 may reject it only by offering “clear and convincing reasons that are supported by  
5 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
6 “However, the ALJ need not accept the opinion of any physician, including a  
7 treating physician, if that opinion is brief, conclusory and inadequately supported  
8 by clinical findings.” *Bray*, 554 F.3d at 1228 (internal quotation marks and  
9 brackets omitted). “If a treating or examining doctor’s opinion is contradicted by  
10 another doctor’s opinion, an ALJ may only reject it by providing specific and  
11 legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at  
12 1216 (citing *Lester*, 81 F.3d at 830-831).

13       The opinion of an acceptable medical source such as a physician or  
14 psychologist is given more weight than that of an “other source.” 20 C.F.R. §  
15 404.1527 (2012); *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). “Other  
16 sources” include nurse practitioners, physicians’ assistants, therapists, teachers,  
17 social workers, spouses and other non-medical sources. 20 C.F.R. § 404.1513(d)

1 (2013).<sup>3</sup> However, the ALJ is required to “consider observations by non-medical  
2 sources as to how an impairment affects a claimant’s ability to work.” *Sprague v.*  
3 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Non-medical testimony can never  
4 establish a diagnosis or disability absent corroborating competent medical  
5 evidence. *Nguyen*, 100 F.3d at 1467. An ALJ is obligated to give reasons germane  
6 to “other source” testimony before discounting it. *Dodrill v. Shalala*, 12 F.3d 915,  
7 918 (9th Cir. 1993).

8 Plaintiff argues that the ALJ distributed weight to the opinions of the  
9 providers in the record based on whether their conclusions aligned with the work  
10 Plaintiff performed from August 2013 through January 2014. ECF No. 16 at 11.  
11 Yet, ignoring that the ALJ did provide other reasons when discounting the opinions  
12 of the treating, examining, and nonexamining sources, Plaintiff failed to identify  
13 with any specificity why certain providers should have been credited over others,  
14 or how the ALJ erred in weighing the opinion evidence. There were two  
15 examining opinions from acceptable medical sources about Plaintiff’s physical  
16 conditions: Dr. S. Daniel Seltzer, Tr. 587-95, and Dr. Eric Rudd, Tr. 455-63; one

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18 <sup>3</sup> Prior to March 27, 2017, the definition of a medical source, as well as the  
19 requirement that an ALJ consider evidence from non-acceptable medical sources,  
20 were located at 20 C.F.R. § 404.1513(d).

1 nonexamining opinion from an acceptable medical source: Dr. Norman Staley, Tr.  
2 102-08; and two medical opinions from “other sources”: treating chiropractor Jory  
3 Anderson, Tr. 457-58, and treating advanced registered nurse practitioner Dennis  
4 Ang, Tr. 481-82. There was one examining opinion from an acceptable medical  
5 source about Plaintiff’s mental conditions: Dr. Richard Schneider, Tr. 468-78; and  
6 two nonexamining opinions from acceptable medical sources: Dr. John Robinson,  
7 Tr. 70-83, and Dr. Renee Eisenhauer, Tr. 85-99.

8       Plaintiff fails to argue or establish any specific error as to the ALJ’s  
9 consideration of these opinions, focusing instead on the general argument that “the  
10 ALJ summarily determined that any treating or examining physician who opined  
11 that [Plaintiff] could not work due to his work injury was inconsistent with the  
12 work record.” ECF No. 16 at 13. Plaintiff also argues that the ALJ does not  
13 indicate whether or not Plaintiff’s spinal impairment or mental health impairment  
14 remained the same from the date of his injury through his alleged disability onset  
15 date, nor does the ALJ cite to medical records that outline any changes in  
16 Plaintiff’s condition. ECF No. 16 at 13. Although Plaintiff is correct that the ALJ  
17 does not make findings as to whether Plaintiff’s impairments remained the same or  
18 worsened during the period of time that he was working before his alleged  
19 disability onset date, as discussed *supra*, the ALJ cited to medical records  
20 approximate to his disability onset date that were inconsistent with the severity of

1 his alleged physical limitations. Tr. 22; *see, e.g.*, Tr. 271-75, 285-89, 297-99, 445-  
2 47. Further, as discussed *supra*, the ALJ found that Plaintiff's mental impairments  
3 were not as severe as alleged during the relevant time period, as Plaintiff had no  
4 documented mental health care. Tr. 26.

5 Because Plaintiff only contests the ALJ's weighing of the opinion evidence  
6 with respect to his work history, Plaintiff has waived any argument as to the  
7 evaluation of any of the medical source opinions in regard to reasons other than  
8 inconsistency with Plaintiff's work activity. *See Carmickle*, 533 F.3d at 1161 n.2;  
9 *Kim*, 154 F.3d at 1000. Despite Plaintiff's waiver, the Court reviewed the record  
10 and finds the ALJ's weighing of the medical opinions is supported by specific and  
11 legitimate reasons supported by substantial evidence.

12 *1. Dr. Staley – Physical Opinion*

13 In July 2015, state agency medical consultant Norman Staley, M.D.  
14 reviewed the medical record and opined that Plaintiff could lift and carry 10  
15 pounds frequently and 20 pounds occasionally. Tr. 92-93. He opined that Plaintiff  
16 could stand and/or walk for two hours in an eight-hour workday, sit for six hours in  
17 the same period, occasionally stoop, kneel, crouch, crawl, and climb ramps and  
18 stairs, and never climb ladders, rope, or scaffolding. Tr. 93. He opined that  
19 Plaintiff needed to avoid concentrated exposure to vibration and hazards. Tr 94.  
20  
-

1 Dr. Staley concluded that Plaintiff would be limited to sedentary exertional level  
2 work. Tr. 97. The ALJ gave Dr. Staley's opinion significant weight. Tr. 28.

3 Plaintiff contends the ALJ erred by giving significant weight to the opinion  
4 of Dr. Staley, a reviewing physician, and little weight to Plaintiff's treating and  
5 examining providers. ECF No. 16 at 13. The opinion of a nonexamining  
6 physician may serve as substantial evidence if it is supported by other evidence in  
7 the record and is consistent with it. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th  
8 Cir. 1995). Other cases have upheld the rejection of an examining or treating  
9 physician based in part on the testimony of a nonexamining medical advisor when  
10 other reasons to reject the opinions of examining and treating physicians exist  
11 independent of the nonexamining doctor's opinion. *Lester*, 81 F.3d at 831 (citing  
12 *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989) (reliance on laboratory  
13 test results, contrary reports from examining physicians and testimony from  
14 claimant that conflicted with treating physician's opinion)); *Roberts v. Shalala*, 66  
15 F.3d 179, 184 (9th Cir. 1995) (rejection of examining psychologist's functional  
16 assessment which conflicted with his own written report and test results). Thus,  
17 case law requires not only an opinion from the consulting physician but also  
18 substantial evidence (more than a mere scintilla but less than a preponderance),  
19 independent of that opinion which supports the rejection of contrary conclusions  
20 by examining or treating physicians. *Andrews*, 53 F.3d at 1039.



1 The ALJ found that the opinion of Dr. Staley was consistent with Plaintiff's  
2 work history, longitudinal examination findings during the relevant period, and  
3 longitudinal treatment records during the relevant period. Tr. 28. Plaintiff  
4 suggests the ALJ should have credited the opinions of Plaintiff's treating and  
5 examining providers over the opinion of the reviewing doctor. However, as  
6 discussed *infra*, the ALJ provided legally sufficient reasons for giving less weight  
7 to the opinions of the treating and examining providers and for giving more weight  
8 to Dr. Staley's opinion.

9 2. Dr. Seltzer – Physical Opinion

10 Plaintiff's examining orthopedic surgeon, S. Daniel Seltzer, M.D.,  
11 completed a report in November 2016. Tr. 587-95. Dr. Seltzer opined that  
12 Plaintiff was capable of full-time work at a light level, with no lifting or carrying  
13 over 10 to 15 pounds and avoidance of twisting, bending, and stooping. Tr. 595.  
14 The ALJ gave significant weight to Dr. Seltzer's assessment with respect to  
15 Plaintiff's functioning through his date last insured, however the ALJ gave greater  
16 weight to the nonexamining physician's assessment of the ability to lift and carry  
17 10 pounds frequently and 20 pounds occasionally. Tr. 29. Because Dr. Seltzer's  
18 opinion as to Plaintiff's lift and carry limitations was contradicted by the  
19 nonexamining opinion of Dr. Staley, Tr. 92-93, the ALJ was required to provide  
20

1 specific and legitimate reasons for discounting this aspect of Dr. Seltzer's opinion.  
2 *Bayliss*, 427 F.3d at 1216.

3       The ALJ found that Dr. Seltzer's opinion was consistent with Plaintiff's  
4 work history, longitudinal examination findings during the relevant period, and  
5 longitudinal treatment records during the relevant period. Tr. 29. However, given  
6 Plaintiff's history of working at a medium to heavy exertional level after the onset  
7 of his spinal impairment, the ALJ gave greater weight to the nonexamining  
8 physician's opinion as to Plaintiff's lift and carry limitations. Tr. 29. "The ALJ  
9 may reject a medical opinion that is inconsistent with the claimant's work  
10 activity." *Schultz v. Berryhill*, No. 3:16-cv-00757-JR, 2017 WL 2312951, at \*4  
11 (D. Or. Apr. 21, 2017) (citing *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d  
12 685, 692-93 (9th Cir. 2009)). Here, the ALJ observed that Plaintiff continued  
13 working at a medium/heavy exertional level for several months after his back  
14 injury in September 2013, Tr. 26 (citing Tr. 197-98), and his work ended for  
15 reasons unrelated to Plaintiff's functional capacity, Tr. 26 (citing Tr. 48-49). The  
16 ALJ reasonably concluded that the record documented work activity that was more  
17 consistent with Dr. Staley's assessment that Plaintiff was able to lift and carry 10  
18 pounds frequently and 20 pounds occasionally. Tr. 29; *see, e.g.*, Tr. 197-98  
19 (Plaintiff reported that he was working full-time as an unloader at Walmart through  
20 January 2014, where he walked for seven hours each day, stood for one hour each

1 day, unloaded up to 80 to 90 pounds from trucks, frequently lifted 30 to 40 pounds,  
2 and spent “a little more than [half a] day” carrying things). Even if the ALJ erred  
3 in rejecting the lift and carry limitations opined by Dr. Seltzer, the error would be  
4 harmless as the vocational expert identified three sedentary level jobs that Plaintiff  
5 was capable of performing. Tr. 60-61. This finding was a specific and legitimate  
6 reason, supported by substantial evidence, for the ALJ to discount the lifting and  
7 carrying aspect of Dr. Seltzer’s opinion.

8 *3. Mr. Anderson – Physical Opinion*

9 Between January 2014 and March 2014, treating chiropractor Jory  
10 Anderson, DC, opined that Plaintiff could seldom sit, stand, or walk, and could  
11 never lift over 10 pounds. Tr. 26 (citing Tr. 309-12). Dr. Anderson reported that  
12 Plaintiff was not released to work due to his spinal impairment. Tr. 309-12. The  
13 ALJ gave Mr. Anderson’s opinion minimal weight. Tr. 26. Because Mr.  
14 Anderson was an “other source,” the ALJ was required to provide germane reasons  
15 to discount his opinion.<sup>4</sup> *Dodrill*, 12 F.3d at 918.

16 First, the ALJ determined that Mr. Anderson’s assessments were  
17 incompatible with Plaintiff’s ability to work at a medium/heavy exertional level for  
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19 <sup>4</sup> As a chiropractor, Mr. Anderson is considered an “other source” under 20 C.F.R.  
20 § 404.1513(d)(1) (2013).

1 several months after his back injury in September 2013. “The ALJ may reject a  
2 medical opinion that is inconsistent with the claimant’s work activity.” *Schultz*,  
3 2017 WL 2312951, at \*4 (citing *Valentine*, 574 F.3d at 692-93). Working with an  
4 impairment supports a conclusion that the impairment is not disabling. *See*  
5 *Drouin*, 966 F.2d at 1258. Here, the ALJ observed that Plaintiff continued  
6 working at a medium/heavy exertional level until January 2014 and ended his work  
7 for reasons unrelated to his functional capacity. Tr. 26, 48-49, 197-98. The ALJ  
8 reasonably concluded that the record documented work activity that was  
9 inconsistent with Mr. Anderson’s opinion that Plaintiff could seldom sit, stand, or  
10 walk, and could never lift over 10 pounds. Tr. 26; *see, e.g.*, Tr. 197-98 (April  
11 2010: Plaintiff reported that he was working full-time as an unloader at Walmart  
12 through January 2014, where he walked for seven hours each day, stood for one  
13 hour each day, unloaded up to 80 to 90 pounds from trucks, frequently lifted 30 to  
14 40 pounds, and spent “a little more than [half a] day” carrying things). This was a  
15 germane reason to discredit Mr. Anderson’s opinion.

16       Second, the ALJ found that Mr. Anderson’s opinion was inconsistent with  
17 other medical evidence in the record. Relevant factors to evaluating any medical  
18 opinion include the amount of relevant evidence that supports the opinion, the  
19 quality of the explanation provided in the opinion, and the consistency of the  
20 medical opinion with the record as a whole. *Lingenfelter v. Astrue*, 504 F.3d 1028,

1 1042 (9th Cir. 2007); *Orn*, 495 F.3d at 631. Here, the ALJ determined that  
2 Plaintiff's presentation during his initial visit with Mr. Anderson in January 2014  
3 was notably inconsistent with medical care that Plaintiff had received just a few  
4 days earlier, and other examination findings and treatment records severely  
5 undermined the reliability of Mr. Anderson's assessment. Tr. 26; *see* Tr. 308  
6 (January 16, 2014: at his initial visit with Mr. Anderson, Plaintiff needed assistance  
7 throughout his examination due to alleged symptoms that prevented him from  
8 walking without assistance); Tr. 285-89 (January 11, 2014: Plaintiff had generally  
9 normal inspections of his back); Tr. 445-47 (January 11, 2014: Plaintiff had mild  
10 pain, denied weakness to the lower extremities, had pain from a seated to standing  
11 position, point tenderness was localized to the lower lumbar mid spine, positive  
12 straight leg raise test, gait was unremarkable); Tr. 297-99 (January 12, 2014:  
13 Plaintiff denied paresthesia, exhibited normal gait and normal inspection of his  
14 back); Tr. 274-75 (February 2014: Plaintiff reported his symptoms had "improved  
15 tremendously" with his conservative treatment regimen, demonstrated full strength  
16 in all muscle groups of all four extremities, with intact sensation). The ALJ  
17 therefore gave greater weight to other assessments that were consistent with the  
18 record as a whole, and which came from acceptable medical sources. Tr. 26. This  
19 was a germane reason to discredit Mr. Anderson's opinion. Further, Plaintiff fails  
20

1 to challenge the ALJ's finding, and therefore, argument on this issue is waived.

2 *See Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000.

3 *4. Dr. Rudd – Physical Opinion*

4 Plaintiff's examining physician, Eric Rudd, M.D., completed an independent  
5 orthopedic evaluation in January 2015. Tr. 455-63. Dr. Rudd concluded that  
6 Plaintiff was not at a point of maximum medical improvement and that it was  
7 premature to rate his degree of impairment. Tr. 462. When asked about Plaintiff's  
8 physical limitations and capability for gainful employment, Dr. Rudd stated that  
9 Plaintiff would remain off work pending reevaluation by his neurosurgeon, Dr.  
10 Wahl. Tr. 462. Dr. Rudd noted, "[h]opefully treatment measures will increase  
11 [Plaintiff's] functionality and get him back to the workforce." Tr. 462. Dr. Rudd  
12 did not give any other assessment of Plaintiff's abilities or limitations. Tr. 455-63.

13 The ALJ found that Dr. Rudd's evaluation did not appear to contain any  
14 opinions about Plaintiff's occupational functioning, and instead deferred such a  
15 determination. Tr. 27. An ALJ may reject an opinion that does "not show how [a  
16 claimant's] symptoms translate into specific functional deficits which preclude  
17 work activity." *See Morgan v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th  
18 Cir. 1999). Dr. Rudd did not offer an opinion about Plaintiff's physical limitations  
19 or capability for gainful employment, rather, he reported that Plaintiff would  
20 remain off work pending reevaluation by his neurosurgeon. Tr. 462. This was a

1 specific and legitimate reason for the ALJ to discount Dr. Rudd's opinion.

2 Plaintiff fails to challenge the ALJ's finding, and therefore, argument on this issue  
3 is waived. *See Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000.

4 *5. ARNP Ang – Physical Opinion*

5 Plaintiff's treating ARNP, Dennis Ang, completed a medical report in  
6 August 2015. Tr. 393-94. ARNP Ang opined that Plaintiff could sit for 30  
7 minutes at a time for a total of about four hours in an eight-hour workday, stand for  
8 30 minutes at a time, and stand and/or walk for a total of about two hours in the  
9 same period. Tr. 393. He opined that Plaintiff could occasionally lift and carry 20  
10 pounds, had an unspecified degree of difficulty with stooping, crouching, kneeling,  
11 and pulling, could rarely reach to the floor, could frequently reach above his  
12 shoulders and to waist level, and could consistently handle objects. Tr. 393-94.  
13 He opined that Plaintiff would likely be absent from work more than four days per  
14 month but added it "depends on the type of work." Tr. 393. In May 2016, ARNP  
15 Ang opined that the limitations described in his assessment from August 2015 had  
16 been ongoing since the original date of Plaintiff's injury in September 2013. Tr.  
17 537.

18 In June 2016, ARNP Ang opined that Plaintiff could stand and/or walk  
19 between one and three hours per workday and needed to change position after 45  
20 minutes of sitting. Tr. 557. He opined that Plaintiff could never climb ladders and

1 could seldom reach, crawl, kneel, or stoop, could seldom lift 25 pounds, could  
2 occasionally lift 15 pounds, and could frequently lift 10 pounds. Tr. 557. ARNP  
3 Ang gave this same assessment in October 2016 and November 2016. Tr. 614,  
4 619. The ALJ gave ARNP Ang's opinion minimal weight. Tr. 28. Because  
5 ARNP Ang was an "other source," the ALJ was required to provide germane  
6 reasons to discount his opinion.<sup>5</sup> *Dodrill*, 12 F.3d at 918.

7 First, the ALJ determined that ARNP Ang's assessments were incompatible  
8 with Plaintiff's work history. Tr. 28. "The ALJ may reject a medical opinion that  
9 is inconsistent with the claimant's work activity." *Schultz*, 2017 WL 2312951, at  
10 \*4 (citing *Valentine*, 574 F.3d at 692-93). Working with an impairment supports a  
11 conclusion that the impairment is not disabling. *See Drouin*, 966 F.2d at 1258.  
12 Here, the ALJ observed that Plaintiff continued working on a full-time basis at a  
13 medium/heavy exertional level for several months after his back injury in  
14

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15 <sup>5</sup> ARNP Ang is not considered an "acceptable medical source[]" under the  
16 regulations. 20 C.F.R. § 404.1513(d)(3). Although the regulations were amended  
17 on March 27, 2017 to include advanced registered nurse practitioners as acceptable  
18 medical sources, the amendment applies to claims filed on or after March 27, 2017.  
19 20 C.F.R. § 404.1502(a)(7). Plaintiff's claim was filed on November 5, 2014, and  
20 thus, ARNP Ang is considered an "other source."



1 September 2013, and his employment ended for reasons unrelated to Plaintiff's  
2 symptoms, impairments, or limitations. Tr. 26, 48-49, 197-98. The ALJ  
3 reasonably concluded that the record documented work activity that was  
4 inconsistent with ARNP Ang's opinion that since September 2013, Plaintiff was  
5 limited to standing for 30 minutes at a time, standing and/or walking for a total of  
6 about two hours in an eight-hour workday, and occasionally lifting and carrying 20  
7 pounds. Tr. 28, 393; *see, e.g.*, Tr. 197-98 (April 2010: Plaintiff reported that he  
8 was working full-time as an unloader at Walmart through January 2014, where he  
9 walked for seven hours each day, stood for one hour each day, unloaded up to 80  
10 to 90 pounds from trucks, frequently lifted 30 to 40 pounds, and spent "a little  
11 more than [half a] day" carrying things). This was a germane reason to discredit  
12 ARNP Ang's opinion.

13       Second, the ALJ found that ARNP Ang's assessments were inconsistent  
14 with Plaintiff's longitudinal treatment history. Tr. 28. An ALJ may discredit  
15 physicians' opinions that are unsupported by the record as a whole. *Batson*, 359  
16 F.3d at 1195. As discussed *supra*, Plaintiff's physical symptoms showed an  
17 improvement with surgical and pharmaceutical treatment. *See* Tr. 349-50 (August  
18 5, 2014: after his July 2014 surgery, Plaintiff reported "significant improvement"  
19 in his symptoms, with reduced back pain and increased activity level, exhibited full  
20 strength in his lower extremities, intact sensation in all lower extremity

1 dermatomes, steady and non-antalgic gait, and negative straight leg raises, was  
2 given instructions to begin weaning off of a back brace in two to three weeks, and  
3 was referred to additional physical therapy); Tr. 377-78 (January 2015: during an  
4 orthopedic appointment, the provider noted that Plaintiff had been “doing  
5 extremely well,” his leg pain had improved, although he exhibited antalgic gait in  
6 his left leg, concurrent with reports of pain symptoms in his left leg); Tr. 479-84  
7 (July and August 2015: Plaintiff reported that his pain symptoms were manageable  
8 with daily use of pain medication, he could tandem walk without difficulty on the  
9 right and with a little difficulty on the left, and he exhibited “excellent” bilateral  
10 strength throughout both of his legs). The ALJ reasonably concluded that this  
11 record of improvement with treatment was inconsistent with ARNP Ang’s opinion  
12 that Plaintiff was incapable of meeting the demands of sedentary work. Tr. 28.  
13 This was a germane reason to discredit ARNP Ang’s opinions. Furthermore,  
14 Plaintiff fails to challenge the ALJ’s determination as to this aspect of the decision,  
15 and therefore, argument on this issue is waived. *See Carmickle*, 533 F.3d at 1161  
16 n.2; *Kim*, 154 F.3d at 1000.

17 Third, the ALJ found ARNP Ang’s opinion was not supported by the  
18 longitudinal examination findings. Tr. 28. A medical opinion may be rejected if it  
19 is unsupported by medical findings. *Bray*, 554 F.3d at 1228; *Batson*, 359 F.3d at  
20 1195; *Thomas*, 278 F.3d at 957; *Tonapetyan*, 242 F.3d at 1149. Here, the ALJ

1 observed that ARNP Ang's opined limitations were inconsistent with the  
2 longitudinal examination findings, as treatment in 2015 through his date last  
3 insured in September 2015 documented only slight neurological deficits and  
4 manageable pain symptoms. Tr. 28; *see* Tr. 387-88 (May 2015: Plaintiff had a  
5 normal examination of his lower extremities, moved without difficulty, did not rise  
6 to stand during conversation, was taking no medication, and was told to use ice and  
7 heat for his spinal impairment); Tr. 389-91 (May 2015: Plaintiff reported pain as a  
8 three on a 10-point scale, reported infrequent use of Percocet, "slightly positive"  
9 left straight leg raise, and examination found no significant neurological deficit).  
10 The ALJ reasonably concluded, based on this record, that ARNP Ang's opined  
11 limitations were inconsistent with the examination record. Tr. 28. This was a  
12 germane reason to discredit ARNP Ang's opinion. Furthermore, Plaintiff fails to  
13 challenge the ALJ's determination as to this aspect of the decision, and therefore,  
14 argument on this issue is waived. *See Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154  
15 F.3d at 1000.

16 Finally, the ALJ found that ARNP Ang's assessment from August 2015 was  
17 equivocal as to Plaintiff's ability to maintain attendance. Tr. 28, 393. "[T]he ALJ  
18 is the final arbiter with respect to resolving ambiguities in the medical evidence."  
19 *Tommasetti*, 533 F.3d at 1041. ARNP Ang opined that Plaintiff would likely be  
20 absent from work more than four days per month but added it "depends on the type

1 of work.” Tr. 393. As noted by the ALJ, this assessment is equivocal, suggesting  
2 that Plaintiff may be able to maintain attendance with less strenuous work. Tr. 28.  
3 Moreover, ARNP Ang opined that this limitation had been ongoing since  
4 Plaintiff’s injury in September 2013, but there was no evidence in the record to  
5 suggest that Plaintiff was absent from his job at Walmart for more than four days  
6 per month. This was a germane reason to reject ARNP Ang’s opinion as to  
7 Plaintiff’s ability to maintain attendance. Furthermore, Plaintiff fails to challenge  
8 the ALJ’s determination as to this aspect of the decision, and therefore, argument  
9 on this issue is waived. *See Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at  
10 1000.

11 *6. Dr. Schneider, Dr. Robinson, and Dr. Eisenhower – Mental Opinions*

12 Plaintiff’s examining psychiatrist, Richard Schneider, M.D., completed an  
13 independent medical examination report in September 2015. Tr. 468-78. Dr.  
14 Schneider diagnosed Plaintiff with a depressive disorder that pre-dated Plaintiff’s  
15 back injury in September 2013. Tr. 473, 475. He opined that there was no  
16 evidence of a causal relationship between Plaintiff’s depressive disorder and his  
17 back injury. Tr. 475. He also noted that there was no objective evidence to  
18 support a diagnosis of a depressive disorder, but that the diagnosis could be  
19 justified by Plaintiff’s subjective reports. Tr. 475. He opined that Plaintiff did not  
20 require any psychiatric accommodations or restrictions in the workplace. Tr. 477.

1 State agency psychological consultant John Robinson, Ph.D. reviewed the  
2 record in May 2015. Tr. 70-83. Dr. Robinson opined that Plaintiff had no  
3 limitations in his understanding and memory, he could learn and perform detailed  
4 tasks, and he might have difficulty performing fast-paced work or sustained  
5 multitasking due to impaired concentration, but he could learn and complete other  
6 tasks for regular work periods. Tr. 79. He opined that Plaintiff could work in the  
7 presence of the general public, could manage simple task cooperation with known  
8 coworkers, and had moderate limitations in his ability to respond appropriately to  
9 changes in a work setting. Tr. 80. In July 2015, another state agency  
10 psychological consultant, Renee Eisenhauer, Ph.D, affirmed this opinion. Tr. 85-  
11 99.

12 The ALJ gave significant weight to Dr. Schneider's assessment of a general  
13 lack of mental limitations, which the ALJ determined to be consistent with  
14 Plaintiff's history of full-time employment despite his longstanding and untreated  
15 depressive disorder, as well as examination findings and lack of objective evidence  
16 of psychological limitations during the relevant period. Tr. 30. However, due to  
17 Plaintiff's combination of impairments and substance use during the relevant  
18 period, the ALJ incorporated mental limitations opined by Dr. Robinson into  
19 Plaintiff's RFC, including the ability to understand, remember, and carry out  
20

1 simple instructions, make judgments commensurate with the functions of unskilled  
2 work, and to tolerate occasional changes in the work environment. Tr. 21, 29-30.

3 Plaintiff fails to assert any challenge to the ALJ's evaluation of the mental  
4 opinion evidence. Therefore, argument on this issue is waived. *See Carmickle*,  
5 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000.

### 6 **C. Step Five**

7 Plaintiff contends the ALJ erred at step five because the ALJ relied upon an  
8 RFC and hypothetical that failed to include all of Plaintiff's limitations, including  
9 his inability to sit for long periods of time. ECF No. 16 at 13-16. However, the  
10 ALJ's RFC need only include those limitations found credible and supported by  
11 substantial evidence. *Bayliss*, 427 F.3d at 1217 ("The hypothetical that the ALJ  
12 posed to the VE contained all of the limitations that the ALJ found credible and  
13 supported by substantial evidence in the record."). The hypothetical that ultimately  
14 serves as the basis for the ALJ's determination, i.e., the hypothetical that is  
15 predicated on the ALJ's final RFC assessment, must account for all of the  
16 limitations and restrictions of the particular claimant. *Bray*, 554 F.3d at 1228. "If  
17 an ALJ's hypothetical does not reflect all of the claimant's limitations, then the  
18 expert's testimony has no evidentiary value to support a finding that the claimant  
19 can perform jobs in the national economy." *Id.* However, the ALJ "is free to  
20 accept or reject restrictions in a hypothetical question that are not supported by

1 substantial evidence.” *Greger v. Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006). A  
2 claimant fails to establish that a step five determination is flawed by simply  
3 restating an argument that the ALJ improperly discounted certain evidence, when  
4 the record demonstrates the evidence was properly rejected. *Stubbs-Danielson v.*  
5 *Astrue*, 539 F.3d 1169, 1175–76 (9th Cir. 2008).

6 Plaintiff asserts that his inability to sit for long periods of time make him  
7 unable to perform sedentary work, which is supported by Mr. Anderson’s opinion  
8 that Plaintiff could only seldomly sit and stand/walk, and ARNP Ang’s opinion  
9 that Plaintiff could sit for only 30 minutes at a time for a total of about four hours  
10 in an eight-hour workday. ECF No. 16 at 15-16. Plaintiff’s argument is based  
11 entirely on the assumption that the ALJ erred in considering the medical opinion  
12 evidence and Plaintiff’s symptom claims. *See Stubbs-Danielson*, 539 F.3d at 1175  
13 (challenge to ALJ’s step five findings was unavailing where it “simply restates  
14 [claimant’s] argument that the ALJ’s RFC finding did not account for all her  
15 limitations”). For reasons discussed throughout this decision, the ALJ’s adverse  
16 findings in regards to Plaintiff’s subjective symptom claims and consideration of  
17 the medical opinion evidence are legally sufficient and supported by substantial  
18 evidence. Thus, the ALJ did not err in assessing the RFC and posed a hypothetical  
19 to the vocational expert that incorporated all of the limitations in the ALJ’s RFC  
20 determination, to which the expert responded that jobs within the national

1 economy exist that Plaintiff could perform. The ALJ properly relied upon this  
2 testimony to support the step five determination. Therefore, the ALJ's step five  
3 determination that Plaintiff was not disabled within the meaning of the Social  
4 Security Act was proper and supported by substantial evidence.

5 **CONCLUSION**

6 After review, the Court finds that the ALJ's decision is supported by  
7 substantial evidence and free of harmful error. **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED**.

9 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
10 **GRANTED**.

11 The District Court Executive is directed to file this Order, enter  
12 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**  
13 **THE FILE**.

14 DATED April 29, 2019.

15 s/Mary K. Dimke  
16 MARY K. DIMKE  
17 UNITED STATES MAGISTRATE JUDGE  
18  
19  
20